

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA, : 15-CR-00252(PKC)
:
:
-against- : United States Courthouse
: Brooklyn, New York
:
: Wednesday, August 16, 2017
JEFFREY WEBB, et al., : 12:30 p.m.
:
Defendant. :
:
- - - - - X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: BRIDGET M. ROHDE, ESQ.
Acting United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: SAMUEL P. NITZE, ESQ.
KEITH EDELMAN, ESQ.
KAITLIN TERESA FARRELL, ESQ.
Assistant United States Attorneys

For the Defendant: BALLARD SPAHR, LLP
Jose Maria Marin 919 Third Avenue
37th Floor
New York, New York 10022
BY: CHARLES ALLEN STILLMAN, ESQ.
JAMES ALFRED MITCHELL, ESQ.
BRADLEY GERSHEL, ESQ.

1 For the Defendant: GREENBERG TRAURIG, LLP
2 Juan Angel Napout One International Place
Boston, Massachusetts 02110
3 BY:A. JOHN PAPPALARDO, ESQ.
ELLIOT H. SCHERKER, ESQ.
4 JACQUELINE BECERRA, ESQ. ***

5 PINERA-VAZQUEZ LAW FIRM
1900 SW 3rd Avenue
6 Miami, Florida 33129
7 BY:SILVIA PINERA-VAZQUEZ, ESQ.
(Via Speakerphone)

8 For the Defendant: BRUCE L. UDOLF, ESQ.
9 Manuel Burga 500 East Broward Boulevard
Suite 1400
10 Fort Lauderdale, Florida 33394
BY:BRUCE L. UDOLF, ESQ.
(Via Speakerphone)

11
12 *** Participated via speakerphone
13
14
15

16 Court Reporter: Stacy A. Mace, RMR, CRR
17 Official Court Reporter
E-mail: SMaceRPR@gmail.com

18 Proceedings recorded by computerized stenography. Transcript
19 produced by Computer-aided Transcription.
20
21
22
23
24
25

Proceedings

3

1 (In open court.)

2 THE COURTROOM DEPUTY: Criminal cause for status
3 conference, Docket 15-CR-252, United States versus Jose Marin,
4 Juan Napout and Manuel Burga.

5 Will the parties please state their appearances for
6 the record?

7 MR. NITZE: Sam Nitze, Keith Edelman and Kaitlin
8 Farrell for the United States.

9 Good afternoon, Judge.

10 THE COURT: Good afternoon.

11 MR. EDELMAN: Good afternoon.

12 MS. FARRELL: Good afternoon.

13 MR. PAPPALARDO: Good afternoon, Your Honor. John
14 Pappalardo on behalf of Mr. Napout.

15 MR. SCHERKER: Elliot Scherker on behalf of
16 Mr. Napout.

17 THE COURT: Good afternoon to both of you.

18 MR. SCHERKER: Good afternoon.

19 MR. STILLMAN: Your Honor, Charles Stillman, Jim
20 Mitchell and Brad Gershel on behalf of Mr. Marin.

21 MR. MITCHELL: Good afternoon, Judge.

22 THE COURT: Good afternoon to you gentlemen.

23 And on the phone.

24 MS. PINERA-VAZQUEZ: Hi, I'm sorry, this is Silvia
25 Pinera. We can barely hear the court proceedings.

Proceedings

4

1 THE COURT: All right, I will keep my voice up. Can
2 you hear me better now?

3 MS. PINERA-VAZQUEZ: I can hear you now. I didn't
4 hear any of the appearances. Would you like us to state our
5 appearances now?

6 THE COURT: Yes.

7 MS. PINERA-VAZQUEZ: This is Silvia Pinera-Vazquez
8 and Jacqueline Becerra on behalf Juan Angel Napout on the
9 phone from Pinera-Vazquez.

10 THE COURT: All right, good afternoon to you both.

11 MS. BECERRA: Good afternoon.

12 MR. UDOLF: Good afternoon, Your Honor. This is
13 Bruce Udolf on behalf of Manuel Burga.

14 THE COURT: Okay, good afternoon to you.

15 All right, as the parties know we are here on two
16 separate sets of motions. The first one, which was filed
17 originally by Mr. Napout, but joined with some amplification
18 by the other two defendants, seeks essentially three things, I
19 guess you could say. The first is translations of all foreign
20 language discovery, and that would include any documents that
21 the Government intends to introduce at trial.

22 And the second is Spanish language transcriptions
23 for all audio recordings of which the Government has provided
24 English translations.

25 Now, I actually grouped together in some way, I

Proceedings

5

1 guess, the three defendants' separate requests, but I probably
2 should break them out to clarify something.

3 Mr. Napout's original request was to get English
4 translations of all foreign language documents that were
5 produced in discovery. And that referred to documents, in
6 particular. But Mr. Udolf and Mr. Mitchell expanded that
7 request to include, in essence, all foreign language
8 discovery.

9 I guess to you, Mr. Mitchell, did you mean to
10 include recordings and documents?

11 MR. MITCHELL: No, I think I was -- we were joining
12 with respect to the --

13 THE COURTROOM DEPUTY: I am sorry, you are going to
14 have to speak into the microphone.

15 MR. MITCHELL: We are joining with respect to
16 Mr. Napout's motion for translations. I understood their
17 motion to be on the documents --

18 THE COURT: Correct.

19 MR. MITCHELL: -- for translation of all foreign
20 language documents.

21 THE COURT: Correct.

22 MR. MITCHELL: So we join as to that with respect to
23 the issue of what the Government intends to use at trial, as
24 well as with respect to the tapes. We just supplemented
25 because I don't think they included Portuguese tapes in their

Proceedings

6

1 request.

2 MR. UDOLF: Can you hear?

3 MS. PINERA-VAZQUEZ: No.

4 I'm sorry to interrupt, but it seems like you guys
5 are coming in and out. Is there any way that we can raise the
6 volume?

7 THE COURT: All right, what I am going to do is ask
8 all the lawyers to use the microphone.

9 MR. MITCHELL: Is this better, Ms. Pinera? Can you
10 hear me? Oh, hopefully.

11 Judge, all I was saying was that we join with
12 respect to Mr. Napout's motion on the document translations,
13 which I understand to be for all language -- all non-English
14 language translations.

15 THE COURT: That is your request, not Mr. Napout's
16 original request.

17 MR. MITCHELL: I think the original request actually
18 was for all of them, and then on the tapes they just asked for
19 the Spanish.

20 THE COURT: You are right.

21 MR. MITCHELL: We ask that it include the
22 Portuguese, that's all.

23 THE COURT: Okay. And then I think, Mr. Udolf, you
24 joined in the request for the Government to provide all
25 translations of all documents, regardless of the original

Proceedings

7

1 language, and that would be in addition to the Spanish -- oh,
2 I guess actually, I am so sorry. Let me go back again.

3 This actually relates to, okay, there are two
4 categories of documents essentially. One are the English
5 translations of all of the foreign language documents produced
6 in discovery. That is what everybody wants.

7 Second, and this is where the expansion comes from
8 the other two defendants, the defendants collectively want
9 transcriptions in the original language of all audio
10 recordings provided by the Government.

11 So have I characterized that correctly at this
12 point?

13 MR. MITCHELL: Yes, Your Honor. I think all we did
14 was add the Portuguese because I think they had just left it
15 off in their original question.

16 Mr. Udolf included, I think, every other potential
17 language. Although, I don't think there are any other tapes
18 other than Portuguese and Spanish.

19 THE COURT: Okay.

20 MR. MITCHELL: But, basically, we just wanted to
21 make sure that if there were interim transcripts that were
22 made in a language of Spanish or Portuguese or some other
23 language, we get those interim transcripts.

24 THE COURT: All right.

25 And then the other motion made by Mr. Napout, in

Proceedings

8

1 essence, asked for a discovery cut-off date.

2 So let me address first the request for the
3 translations and transcriptions. So first of all, as the
4 Government does note, they are not required to provide English
5 translations of all discovery that they provide. I think
6 Judge Ross's decision in Mayes is instructive, certainly in
7 part, because it relates to audio recordings, but I think it
8 is equally applicable to documents. And, basically, she wrote
9 in that decision, which is 2011 Westlaw 5320976 from
10 November 2nd, 2011, that the Government is under no obligation
11 to provide a transcript of audio recordings it has made
12 available to defense counsel.

13 And then she goes on to say that draft transcripts
14 are provided by the Government voluntarily to assist the
15 defense in preparing for trial. And then she, of course, goes
16 on to say that it is fair and appropriate for the Government
17 to only produce draft transcripts with stipulations, and this
18 district has routinely enforced those stipulations with regard
19 to draft transcripts.

20 A more recent decision on that issue was Judge
21 Kuntz's decision in U.S. versus Bumagin, 136 F. Supp. 3d, 361
22 from September 29th, 2015, and Judge Kuntz reiterates that
23 stipulations relating to draft transcripts are enforceable and
24 operate to prohibit the use of the draft transcript as limited
25 by the stipulations.

Proceedings

9

1 Now, the reason I cite Mayes is because the
2 defendants all want the Government to, essentially, translate
3 into English all of the foreign language documents that were
4 produced during discovery beyond those that the Government
5 intends to use at trial, and there simply is no support in
6 Rule 16 or cited by any of the defendants for requiring the
7 Government to do that.

8 I also think, as the Government correctly points
9 out, that in this case that would be an inordinately
10 burdensome and largely useless endeavor for the Government to
11 engage in because as the parties themselves argued to me
12 repeatedly, there are many, many documents that do not relate
13 directly to the defendants, themselves. Mr. Napout argues
14 this most vociferously and repeatedly that there is so much
15 discovery that does not really relate to him, but in theory
16 relates to the broader RICO conspiracy that is alleged; or is
17 just being provided because the Government is complying with
18 its discovery requests to the fullest extent where we have a
19 case that involves a hundred-plus page Indictment and 20-plus
20 indicted individuals.

21 So I just do not see any basis in the law or in
22 practical terms for granting the request for all discovery
23 documents to be translated by the Government. And the
24 Government does cite some cases related to CJA funds being
25 used for translations, but even there, there are limits placed

Proceedings

10

1 on what documents have to be translated and it has to be tied
2 in some way to a genuine issue of need or utility, and I do
3 not see that here.

4 That being said, the Government, of course, is
5 required to, and acknowledges that it is required to provide
6 English translations for all documents it intends to use as
7 exhibits at trial. I understand that they have been doing
8 that throughout the course of discovery.

9 MR. STILLMAN: Excuse me, Your Honor.

10 THE COURT: Actually, let me take it back. With
11 respect to documents, I gather that that is not true. But
12 with respect to about 200 audiotapes, the Government has
13 provided English translations/transcriptions, and I know that
14 there is another part of the motion that complains about that
15 to some extent. But my understanding also from the
16 Government, and obviously I am accepting their representation,
17 is that a good part of the documents that will be introduced
18 by the Government at trial are statutes and regulations in
19 foreign languages that can be readily translated by all
20 parties, I gather, and also are not going to be particularly
21 controversial or subject to investigation, such that the
22 translation is going to be so critical to trial preparation.

23 The other part of the documentary evidence, I
24 understand, are bank records and those do not contain, as
25 represented to me by the Government, a lot of narrative or

Proceedings

11

1 text or material in foreign languages that has to be
2 translated, but rather it will have a stock set of terms such
3 as accounts or balances, credits, et cetera, that can be
4 readily translated by the Government and turned over. But I
5 assume most of the bank records have numbers, more than they
6 do text.

7 Now, obviously, that does not represent everything,
8 and the Government will have to, with all due speed, turn over
9 English translations of all the documentary exhibits that they
10 intend to introduce.

11 So, perhaps, Mr. Nitze, you can give me some idea of
12 the volume of documents we are talking about in terms of trial
13 exhibits or likely trial exhibits that have yet to be turned
14 over with respect to the English translation?

15 MR. NITZE: Yes, thank you, Your Honor. If I could
16 just go over a couple of points you just made, and then answer
17 your question.

18 First, you are right with respect to the recordings.
19 We recently turned over to two of the three defendants under
20 stipulation updated and fairly well updated draft English
21 language transcripts of, I think it's approximately 50
22 recordings that are the ones that are most relevant to trial.
23 And we intend to with respect to those, to trim them down
24 further and to submit certified proposed trial --

25 MS. PINERA-VAZQUEZ: I am sorry to interrupt. This

Proceedings

12

1 is Sylvia. Can whoever is speaking speak up just a little bit
2 because we are having a hard time hearing?

3 THE COURT: Yes, hold on. Mr. Nitze will use the
4 microphone and recap a little of what he said.

5 And also in that regard, Mr. Nitze, you are right, I
6 stand corrected. It's not 200 total recordings, but 150
7 total, 50 of which have now updated transcripts, right?

8 MR. NITZE: That's correct, Your Honor.

9 So just to recap for those on the phone --

10 THE COURT: Speak louder than you are used to for
11 the folks on the phone.

12 MR. NITZE: Is this better, Silvia?

13 MS. PINERA-VAZQUEZ: Yes.

14 THE COURT: Can you hear, Mr. Udolf?

15 MR. UDOLF: I can hear now, yes.

16 THE COURT: We are all going to yell. Mr. Nitze, I
17 know this is not your personality, but yell.

18 MR. NITZE: So we have recently turned over updated,
19 and I would say fairly well updated, draft transcripts of 50
20 or so of the recordings made during the course of the
21 investigation. The recordings were turned over long ago. And
22 our plan with respect to those and trial exhibits is to narrow
23 them further. We do not intend to introduce into evidence 50
24 recordings or anything close to that, nor do we intend to
25 introduce the full -- some of these recordings are quite

Proceedings

13

1 lengthy. We don't intend to introduce whole hours' worth of
2 recordings. And so the documents, the translations that
3 defense counsel have now I do think provide a basis for having
4 discussions about accuracy or if there are sections they feel
5 were missing, that discussion can begin, but we will also be
6 producing proposed final transcripts that will then be at the
7 level of this is what we plan for the jury to hear and
8 understand.

9 THE COURT: But those are the audios?

10 MR. NITZE: I am now talking about audio, yes.

11 With respect to the documents, there are, as you
12 say, a number of trial exhibits that will be foreign language
13 documents, but that we expect will not be, with respect to
14 translations, particularly controversial. These are
15 enterprise entity-type documents, statutes, codes of ethics,
16 bylaws, potentially some contracts, some of which the
17 defendants, themselves, were involved in either authoring or
18 approving; and certainly at least with respect to defendant
19 Napout, who we understand is not planning to contest the
20 enterprise or the racketeering conduct, we just don't think
21 these documents will be particularly controversial.

22 Bank records, there are some that are like account
23 statements, for example, where even just from the face of them
24 you can tell how they function because if you have ever seen
25 an account statement, they follow that format. There are

Proceedings

14

1 others, wire transfer requests, for example, where the thrust
2 of what's happening in the document is clear, but where there
3 is -- there are sentences that we plan to translate and have
4 certified translations.

5 We expect to have the first batches of certified
6 documents that are potential trial exhibits, it's probably
7 going to over-translate at first, out this week. And we plan
8 to continue to produce those on a rolling basis until we have
9 all have the potential -- the proposed trial exhibits out in
10 time for defense counsel to have their own translations done,
11 review them with their clients. Most of these are Spanish
12 language documents and their clients are native Spanish
13 speakers, at least two of the three. So that is the plan.

14 And then, ultimately, we would also propose to have
15 an exhibit list and disks with trial exhibits that also would
16 have, for those that are foreign language exhibits,
17 accompanying certified translations attached to them. Again,
18 this would be before the start of trial.

19 THE COURT: Well, to the extent it is on a rolling
20 basis, what is a realistic outside date for all of these
21 translated exhibits to be produced, do you think?

22 MR. NITZE: We would propose to have final recording
23 transcripts, and I am focusing on those a bit because they
24 are --

25 THE COURT: Longer.

Proceedings

15

1 MR. NITZE: Well, they are longer and I think, my
2 guess is that there will be particular scrutiny paid to what
3 is said in a conversation where there are four people present.
4 What is something that might seem -- is audible to the
5 linguist, but not to somebody else. Those seem important to
6 address, and that's why we've --

7 THE COURT: Prioritized them.

8 MR. NITZE: -- prioritized those. So we would
9 propose to have the reduced -- those are already over, so it
10 can start -- turned over, but to have the proposed finals in
11 by the date of the 3500 material, which would be September
12 25th. That's, I think, six weeks out from the start of jury
13 selection and likely, you know, longer than that out from when
14 they would actually be introduced.

15 And then to have the remainder of the exhibits three
16 weeks out from jury selection, from November 6th. And I want
17 to emphasize there, these are not dates -- we are not
18 suggesting three weeks out there's a dump of exhibits, but
19 rather this process of batches coming, which can be reviewed,
20 will be complete by then.

21 I wouldn't want to say just as I sort of nod to the
22 practical realities, could there be another document or
23 something that would be after that deadline where we could
24 have a discussion about whether there is sufficient time to
25 review it, that would be one thing; but we would propose those

Proceedings

16

1 as deadlines for trying to complete that process.

2 THE COURT: Okay. Did anyone want to say anything
3 in response to what the Government has just said?

4 Mr. Udolf, I will start with those on the phone.
5 Just on the documents, let's talk about documents for the
6 moment, English translations of documents, or even respond to
7 what I said.

8 MR. UDOLF: Judge, I've probably got the least
9 ability to hear everything that was said by counsel. So I am
10 going to have to defer to counsel that's present at the
11 hearing.

12 THE COURT: Okay.

13 MR. UDOLF: I got in, basically, around 50 percent
14 of what was said.

15 THE COURT: Okay, let me start then with the counsel
16 who is here.

17 So whoever is seated here, Mr. Stillman or
18 Mr. Pappalardo, do you want to say something regarding just
19 the English translations of the documents?

20 I have, obviously, ruled that you do not get
21 translations of all the discovery documents, and then the
22 Government has offered up a timeline, in effect, for getting
23 the rest of the exhibit translations.

24 MR. SCHERKER: Your Honor, we understand the general
25 rule on entitlement to translations, and we acknowledge that

Proceedings

17

1 in our motion.

2 THE COURT: Right.

3 MR. SCHERKER: Pardon me, if I might address the
4 Court from here so other people can hear?

5 THE COURT: No, keep that closer to you and you do
6 not have to stand.

7 And let me make that note, I appreciate you
8 acknowledging it, because in your submission you really cited
9 cases that stand for the proposition that you are entitled to
10 translation of trial exhibits, and nothing more.

11 MR. SCHERKER: That is correct, Your Honor.

12 THE COURT: Okay.

13 MR. SCHERKER: And the only reason we asked for more
14 is because of the open caveats in the Government's motion in
15 limine on other acts, which twice, as we point out in our
16 papers, our reply to that submission, reserves the right to do
17 pretty much whatever they want to do at trial.

18 THE COURT: Right.

19 MR. SCHERKER: So --

20 THE COURT: That part of it, I think, is a bit
21 hyperbolic, if not histrionic. I think that assumes that the
22 Government is going to be allowed to produce at the last
23 minute whatever it wants or introduce.

24 So I can assure you that we have a process that has
25 been quite controlled with a set of deadlines that have been

Proceedings

18

1 observed by all parties, including the Government, which has
2 turned over well in advance of trial its 404(b), let's call
3 it, or other acts or enterprise evidence. And they will be
4 required to abide by the same deadlines and its
5 representations.

6 MR. SCHERKER: And, Your Honor, I appreciate that.
7 What I was going to say was something much more
8 modest, I hope --

9 THE COURT: Okay.

10 MR. SCHERKER: -- and certainly less histrionic, was
11 that should an issue -- I want to be sure there's a protocol
12 in place if the Government elects to use that option, and I
13 don't mean with a document dump, but with a document we hadn't
14 seen before, but elects to use that option of amplifying their
15 case a bit --

16 THE COURT: Right.

17 MR. SCHERKER: -- and the documents involved that we
18 have not seen before in another language, that there is a
19 process in place where we can do what we're going to do at a
20 more leisurely pace now. So that we would have an opportunity
21 to examine the translation and go through the same exercise to
22 be sure that we know what that document is; and if we have to
23 contest it, we can contest it.

24 THE COURT: I do not have any concerns based on the
25 history of the case and how all parties have proceeded that we

Proceedings

19

1 are going to have undue or unfair surprise. Granted, I,
2 obviously, am not privy to all of the discovery that has been
3 turned over, though I know it is quite voluminous and started
4 well over a year ago back before April 2016. If anything, I
5 think the complaints are that there is too much information
6 being provided.

7 That being said, I am also aware that the Government
8 continues to get additional information and potential evidence
9 from other sources from around the world and other countries,
10 as well as more recent evidence that it got, I think around
11 March of this year, based on what they have characterized as
12 the obstruction or not based on, but because of what the
13 Government has described as the obstruction part of their case
14 against Mr. Napout, namely evidence --

15 MS. PINERA-VAZQUEZ: I'm sorry. I'm sorry to
16 interrupt again, but because I've got Bruce on the line with
17 us, but whoever is speaking, can you speak up a little bit
18 into the microphone?

19 THE COURT: All right, can you hear me now?

20 MS. PINERA-VAZQUEZ: Yes, that's much better. If
21 you speak a little bit louder, that's better, otherwise you
22 come in and out. Thank you.

23 THE COURT: All right.

24 So what I was saying was I am also aware that some
25 evidence is coming in belatedly it might appear. It might

1 appear belatedly, but there have been good reasons. So, for
2 example, recently obtained search evidence is some of what you
3 cited, and I am a little concerned about the way it has been
4 characterized as if the Government was holding out on certain
5 information, which they only recently were able to obtain, in
6 part. And, again, this is the Government's representation,
7 because of what they called obstructive conduct by your
8 client, in terms of, I think, concealing or making some of the
9 electronic devices in evidence unavailable to the Government
10 for a period of time.

11 So without wading into the specifics of it, I
12 understand two things. One is that there has been a large
13 volume of discovery produced over the course of the last
14 year-and-a-half, that there will be some additional discovery
15 that will continue to be produced, but, and this is thirdly, I
16 guess, I do not perceive at this time that any of the later
17 discovery or the rolling basis of the discovery is due to a
18 lack of diligence or forthcomingness by the Government, but
19 rather they have been trying to release the information as
20 soon as possible subject to certain constraints. And I think
21 one of the recent ones is trying to go through a privilege
22 review of Mr. Napout's device-related evidence.

23 So unless you are going to tell me something
24 different, I do not perceive that we have an issue of lack of
25 diligence or hiding the ball at all by the Government or

Proceedings

21

1 trying to delay disclosure to gain some tactical advantage.

2 MR. SCHERKER: Just so we're clear on what we're
3 asking for, I think the Court's order setting this hearing
4 identified what -- there was no request for sanctions or to
5 come down on the Government. What we --

6 THE COURT: You want some assurance.

7 MR. SCHERKER: -- need is a cut-off date and
8 assurance. And if I might, there were statements that we
9 would be done in April of 2016 with most of the discovery,
10 which we point out in our motion. But, again, we need to be
11 done at a reasonable time before trial, and we accept
12 September 25th as reasonable. That's when we're getting
13 Giglio, that's when we're getting Jencks, and I believe we
14 suggested that in our motion. I wasn't sure what the
15 three-week window meant exactly, so I am having a hard time
16 processing it.

17 MR. NITZE: If I could repeat just that point on
18 scheduling. The proposal was that by September 25th, the date
19 that our sort of non-sensitive Jencks is due, to put it that
20 way, we would have finalized or proposed finalized transcripts
21 of audio recordings that we would seek to put into evidence.
22 And the basis for that deadline being there is just,
23 hopefully, we can begin to have those discussions before then,
24 but those translations may be the subject of more back and
25 forth just given the nature of the underlying substance. It

1 is not a contract in black and white, it's people talking
2 picked up on a bodywire sometimes.

3 The three-week deadline was three weeks out that we
4 would then have our, essentially our exhibits, documentary
5 exhibits translated and produced with certified translations.
6 And I did want to emphasize that the proposal is not that
7 three weeks out from the date of jury selection we turn over a
8 disk full of all the translations and say good luck, but
9 rather that on a rolling basis between now and then batches
10 will be going out. We expect the first batch to go out this
11 week, and that process is well underway, but that would be the
12 date by which we would have completed that process. Again,
13 with an exception not for a dump close to trial, but just the
14 inevitable stray document.

15 THE COURT: Right.

16 MR. MITCHELL: Your Honor, can I ask one question
17 just for point of clarification?

18 It might be helpful in understanding this three-week
19 proposal if Mr. Nitze had some sense to sort of give an
20 estimate of the volume. Is there pages or documents? I mean
21 how much material is there that I call documents that you
22 intend to use at trial that you need to translate; and if you
23 can give us some sense? Because if it's a million pages or
24 whatever, we have a different issue on the three weeks.

25 MR. NITZE: Right, it's not a million pages, I don't

1 think, but it is significant volume. And that's, in part, to
2 pick one example, contracts related to the Copa Libertadores.
3 They are not very lengthy contracts, we won't probably put in
4 every contract that was inked on the tournament, but they are
5 legal documents written in Spanish. I think documents that
6 all three trial defendants are intimately familiar with and
7 whose contents are not particularly controversial, they set
8 forth tournament additions, amounts to be paid and so forth,
9 but there is some length and density to those documents and
10 there will be a fair number of contracts. I mean, you know, I
11 don't know if dozens is right, that's probably not right, but
12 a lot of contracts.

13 THE COURT: Let me interject actually, Mr. Nitze.

14 I do not think we need to go through this exercise
15 because let's face it, folks, you have all the documents that
16 Mr. Nitze is discussing in the original language. And, quite
17 frankly, I know that your clients at least are able to
18 understand the vast majority of those documents or read them
19 themselves. Plus, I am fairly certain that you all have
20 people on your staff who are able to read and speak Spanish.
21 So my concern here is that you all are trying to pin down in
22 some very rigid way this process.

23 My approach to this is going to be that the
24 Government understands the risks that they face by not timely
25 producing these translations of the documents that the

1 defendants have had, for some of them, I think, for over a
2 year. So they will operate with that in mind and at their
3 peril to some extent, but I do not want to get into a lengthy
4 discussion about how much is going to be produced because it
5 is, ultimately, not going to affect what is going to happen
6 today.

7 Essentially, the Government's schedule is the one
8 they are proposing, which I find reasonable based on what they
9 have represented so far, with the understanding that the three
10 weeks out from trial is not the data dump date, but rather is
11 the date of anticipated completion of the turning over of
12 documents on a as-quickly-as-possible basis, with respect to
13 the translation of the documents.

14 So I apologize for interrupting you, but in part
15 because we have people who are on the phone and Mr. Nitze
16 could easily give a very lengthy explanation, I just do not
17 think it is going to change anything. We are going to go with
18 the representation that these are the deadlines that the
19 Government is aspiring to meet. If there are any documents
20 that get disclosed late with respect to the translations and
21 the parties generally feel like they are at a disadvantage,
22 then you should bring that to my attention immediately.

23 The Government obviously, as I said before, runs the
24 risk that they will not get the document in if they do not
25 turn over the translation in time. So that is just where we

Proceedings

25

1 are.

2 And my apologies, Mr. Mitchell. It is not that your
3 question is irrelevant from your point of view, I just do not
4 think it is going to change anything we decide today.

5 MR. MITCHELL: I appreciate it, Judge.

6 THE COURT: So just to recap, September 25th is
7 certainly the aspirational date and the target date for the
8 Government to turn over the relatively finalized I think, or
9 finalized transcripts, English translations of the audio
10 evidence.

11 And then three weeks out, I do not know what the
12 date is exactly, but it would be sometime in mid October, the
13 Government will endeavor to complete its production of all
14 English translation of discovery documents that are going to
15 be used as exhibits at trial.

16 This does not foreclose any defendant from
17 complaining about the later disclosure, nor does it foreclose
18 the Government from introducing documents or seeking to
19 introduce documents that they discover later. Obviously, they
20 are going to have to explain why they were turned over later,
21 or even admitting something that was turned over before, but
22 only gets a translation after these deadlines based on some
23 explanation for why they are being produced in English later
24 than these dates.

25 I think what the defense is getting out of this is,

Proceedings

26

1 at least, some guidelines about which you can then cite as a
2 basis for a potential unfairness or prejudice argument, but
3 nothing is written in stone. It's all going to be governed on
4 a case-by-case/document-by-document basis. So no one should
5 go away thinking they have gotten hard and fast deadlines.

6 In that vein, Mr. Pappalardo, I am not going to set
7 a discovery cut-off. I think as is true in all, or most
8 criminal cases I should say, it is a rule of reason. The
9 Government will certainly have to explain any belated
10 disclosure that the defense claims is prejudicial to them.
11 And, obviously, the defense will have to explain why they are
12 prejudiced by this. I think, as I said before, I have not
13 come to the conclusion that the Government has acted in any
14 dilatory fashion, and I think given the volume of evidence and
15 the number of defendants and the sources, the disparate
16 sources of that evidence, they have tried to act responsibly.

17 But that does not mean that at some point they
18 attempt to get in a document or turn over something that they
19 want to use that I bar because it is produced too late for
20 this trial for these defendants.

21 Let's turn to the second --

22 MR. STILLMAN: Your Honor --

23 THE COURT: Yes.

24 MR. STILLMAN: I'm sorry.

25 THE COURT: Mr. Stillman, please.

Proceedings

27

1 MR. STILLMAN: And may I ask just a question about
2 the translations? And I appreciate what we've gotten,
3 received, and what we are going to receive. My question is,
4 and so we are doing our part trying to, you know, listen and
5 look at the translations. My question is are we listening to
6 the same tape recording; that is to say, we have the material
7 you produced -- I don't mean to speak directly, Your Honor.

8 THE COURT: That's okay. You can direct it to
9 Mr. Nitze and team --

10 MR. STILLMAN: All right.

11 THE COURT: -- because they will probably understand
12 what you're saying, I do not.

13 MR. STILLMAN: So I mean are you listening to the
14 same tape that I am listening to when you are making your
15 translations or is yours -- do you have an enhanced tape from
16 which you're making the translation?

17 That is my question.

18 MR. NITZE: To my understanding, we are listening to
19 the very same audio file.

20 MR. STILLMAN: Thank you.

21 THE COURT: Any enhanced tapes, though, should be
22 turned over.

23 MR. NITZE: Yes, and we -- that I know of, and we
24 can doublecheck and I will be in touch with you, we haven't
25 enhanced any of the audio files. We have been dealing with

Proceedings

28

1 the audio files as they are. So I think the answer is yes, we
2 are listening to the same files.

3 MR. STILLMAN: Thanks, Sam.

4 THE COURT: Okay. Now, I am going to state the
5 obvious, you all can work some of these issues out amongst
6 yourselves and not --

7 MR. PAPPALARDO: Your Honor --

8 THE COURT: Yes.

9 MR. PAPPALARDO: -- if I may. I have one question
10 with regard to the representation now for the second time by
11 the Government that we will receive the non-sensitive Jencks
12 by September 25th.

13 What is the sensitive Jencks; and who determines
14 that sensitivity, who decides that? And what is the deadline
15 for the production of the sensitive Jencks, and why is it
16 sensitive?

17 THE COURT: I interpreted this as relating to the
18 motion that you filed for the unsealing of certain -- well,
19 actually no, I should not say that. That I have already
20 resolved.

21 MR. PAPPALARDO: Right.

22 THE COURT: I do believe we addressed this earlier,
23 and I think I understand what the Government is referring to,
24 but it has not necessarily been the subject of any fuller
25 briefing or discussion.

Proceedings

29

1 What can you say about that because we should, at
2 least, alert the parties to this issue?

3 MR. NITZE: Yes, and we can review the transcript.
4 I believe this was discussed on the record, but I believe the
5 idea is that on September 25th, to the extent there are
6 statements of witnesses, the disclosure of which would pose
7 some risk, either to -- I mean the obvious one being to the
8 witness, themselves, or to some other aspect of investigative
9 activity, that we would seek leave to disclose those
10 statements later or potentially to have a redacted version
11 turned over on September 25th with the sensitive details to
12 come at a later date. That would be the idea.

13 THE COURT: Let me ask you one question, though. I
14 think the time Ms. Mace, as I recall, was representing the
15 Government at that appearance that we had that conversation,
16 maybe I incorrectly assumed that that had to do with what was
17 addressed with respect to the search warrant applications.
18 And that has already been addressed, the parties have received
19 those with some limitations, but there is something else, I
20 gather, with respect to sensitive arguable Jencks material.

21 MR. NITZE: Well, yes, and even in that context
22 there may be statements that are far more explicit and
23 revealing of locations or identities of people that we might
24 seek leave to submit at a later date. We are committed to
25 turning over Jencks in advance of witness testimony and making

Proceedings

30

1 sure defense counsel has an opportunity to digest it and be
2 prepared to cross-examine witnesses, but there are real
3 sensitivities at issue here, which the Court is aware of and I
4 think the parties are too. And so there likely are going to
5 be sets of statements or particular statements within
6 documents that we will seek leave to disclose at a later date
7 to respect those interests.

8 THE COURT: The one thing we ought to do then maybe,
9 and we haven't done this yet, is probably build in a deadline
10 for briefing of that because the Government anticipates that
11 they will be seeking to delay the disclosure of certain Jencks
12 material, if I am hearing you correctly. I would like to
13 build in a deadline for that briefing because I am assuming
14 that it will come, but you are anticipating filing that on
15 September 25th, I gather.

16 MR. NITZE: Well, September 25th, which is six weeks
17 from the start of jury selection, which is well in advance of
18 when we normally would be turning over Jencks. And so I think
19 the framework, to step back, was we will produce Jencks early,
20 significantly early.

21 THE COURT: Yes.

22 MR. NITZE: So that defense counsel has an
23 opportunity to begin to digest it and take all of that into
24 account. And then at that point we would notify the Court
25 about which, if any, materials would be held for later

Proceedings

31

1 production. But that is so far out from six weeks out from
2 even the start of jury selection, that there would be time
3 then to resolve that question. And should the Court determine
4 that, look, this statement needs to go over now or this one
5 should go -- that we would propose a framework for the
6 disclosure of those materials.

7 THE COURT: I do not necessarily have a problem with
8 September 25th being the date on which the Government moves,
9 because obviously that is the last date on which you could
10 move since you will otherwise be required to turn over all
11 Jencks if you do not move, but I do not have any sense of what
12 volume of materials we are talking about.

13 Not to pick up Mr. Mitchell's refrain, but in other
14 words percentage-wise of the Jencks that would be turned over
15 in the trial, are we talking about 50 percent you are going to
16 seek to or maybe 10 percent?

17 MR. NITZE: Nothing close to 50 percent.

18 THE COURT: Okay.

19 MR. NITZE: We are going to put the percentage well
20 below that.

21 THE COURT: Let's do this then, then I am going to
22 build into the schedule the filing of any request to delay
23 disclosure of Jencks material and fix that as the date on
24 which you will file that. Maybe that is the default date, in
25 effect, but now at least all the parties are aware that such a

Proceedings

32

1 motion will be coming. So, basically, you are going to be
2 seeking delayed disclosure of -- when I say delayed, delayed
3 vis-a-vis the dates that we have set.

4 MR. NITZE: Less early.

5 THE COURT: Yes, right, less early.

6 MR. MITCHELL: Less early.

7 THE COURT: The Government has a way of spinning
8 things, don't they; less early.

9 So let's set then a response date of -- which would
10 be difficult, I think, because this is going to be in camera,
11 I suspect, largely, but I will give the defense two weeks to,
12 at least, file something in response. And I probably will not
13 require a reply of the Government. You certainly can if you
14 want, but I am going to try to decide --

15 MS. PINERA-VAZQUEZ: I'm sorry, this is Sylvia
16 again. Judge, you are coming in and out.

17 THE COURT: Okay.

18 MS. PINERA-VAZQUEZ: We can barely hear you.

19 THE COURT: Yes, all right. So, basically, what I
20 have instructed the Government and advised the defense is that
21 September 25th will be the due date, which it is in effect now
22 anyway, for the Government to file a motion seeking to give
23 less early disclosure of Jencks material than the 25th for
24 some portion of the Jencks material, the Government thinks
25 it's less than 50 percent, perhaps I guess far less than

Proceedings

33

1 50 percent. And the defense will have two weeks to respond.

2 Now, I recognize that the opportunity for the most
3 fullsome or meaningful response will be limited by the fact
4 that the Government is likely to seek to file their motion in
5 part in camera or under seal because I will have to see the
6 statements to appreciate the Government's argument, but I will
7 ask the Government to file as much of it as it can on the
8 public record and redact only as necessary so that the defense
9 has some opportunity to respond.

10 MR. NITZE: Understood, Your Honor.

11 THE COURT: So what is two weeks from September
12 25th? October --

13 THE COURTROOM DEPUTY: October 9.

14 THE COURT: -- okay, October 9. I will resolve that
15 motion before the end of the week so that to the extent that I
16 deny any portion of it, then the release of documents will
17 happen, I think, four weeks before trial or thereabout.

18 So let's turn now, unless anyone has any other
19 comments, to the second part of the request for
20 translation-related discovery, if you want to call it that,
21 from the Government.

22 In Mr. Napout's motion he seeks to get original
23 Spanish language transcriptions for all audio recordings in
24 Spanish, and then the other defendants are seeking to have
25 that apply to all foreign language audio recordings, which may

Proceedings

34

1 just be Portuguese, but I guess any other foreign language
2 audio recordings.

3 The Government has responded that they do not have
4 any such original language transcripts, and also that they are
5 not required to produce them.

6 Again, I am inclined to agree with the Government on
7 this. They have provided the English language transcripts.
8 The defense has what they need to determine if they agree with
9 those transcripts based on its own review of the original
10 language transcripts.

11 MR. STILLMAN: Your Honor, if they don't have them,
12 the other part of it is irrelevant. You say you don't have
13 them, you don't have them.

14 MR. NITZE: Right.

15 THE COURT: Well, right, but then I don't know if
16 Mr. Napout was asking that they be created. So I wanted to
17 finish that thought by saying --

18 MR. SCHERKER: No, Your Honor.

19 THE COURT: Okay.

20 MR. STILLMAN: They can't give what they don't have.

21 THE COURT: Okay, fine.

22 MR. SCHERKER: The only reason for wanting what we
23 thought were what would in the normal course of events be the
24 original Spanish language, so we could compare the
25 translations. We were never going to ask Mr. Nitze to

Proceedings

35

1 recreate a Spanish-language version of the tapes.

2 THE COURT: So can I just ask you folks one simple
3 question?

4 Why didn't you just ask the Government that question
5 instead of filing a whole motion? I do not mean to be obtuse
6 here.

7 MR. SCHERKER: Your Honor, we did not know that
8 there were no original language. We know in the ordinary
9 course of this process they were usually taken down in the
10 original language and then translated verbatim.

11 THE COURT: You know, there is a thing called a
12 telephone. You pick it up, you call the Government and say,
13 Do you have any? Then you don't have to spend all this time
14 and money filing a motion. Just a thought for the future,
15 please.

16 MR. SCHERKER: Noted, Your Honor.

17 THE COURT: Okay. So I understand it does not
18 necessarily obviate your first request, but I am just saying
19 we could have made this a little shorter.

20 So the second request is effectively mooted because
21 the Government does not have what the defendants are seeking,
22 and the defendants acknowledge that they are not asking the
23 Government to create such original language transcripts.

24 So I think we have resolved all of the pending
25 issues. Does anyone want to add anything, of the lawyers who

Proceedings

36

1 are here?

2 MR. SCHERKER: Yes, Your Honor.

3 THE COURT: Yes.

4 MR. SCHERKER: This only arose as a result of the
5 Government's recent response to our motion for the
6 translations. So this actually isn't part of our motion, but
7 it is before the Court because the Government has advised that
8 what we actually have now are draft transcripts. And that the
9 Government's provided to the co-defendants updated and, now we
10 understand, higher quality draft transcript.

11 THE COURT: I think more refined probably. I don't
12 know if higher quality is the right term, but the Government,
13 I presume, repeatedly reviews its translations with someone
14 who is listening to the recording and decides if it's accurate
15 and tries to make it more accurate.

16 MR. SCHERKER: I understand. The stipulation that
17 is at the center of this dispute, the updated, for lack of a
18 better description --

19 THE COURT: The draft transcripts.

20 MR. SCHERKER: -- updated drafts have been provided
21 to my co-defendants.

22 THE COURT: Right, the reason they have not been
23 provided to you, as I understand it, is because you are not
24 willing to sign the draft transcript stipulation.

25 MR. SCHERKER: Your Honor, what we objected to, and

Proceedings

37

1 I am reading from it, is all draft transcripts, whether in the
2 possession of defense counsel or the defendant, will be
3 returned to the United States when final transcripts are
4 provided by the United States when the jury is sworn in this
5 case, whichever occurs first.

6 THE COURT: Okay.

7 MR. SCHERKER: They are going to give them to us and
8 then they want them back.

9 THE COURT: Once you get the final transcripts.

10 MR. SCHERKER: But if I heard Mr. Nitze correctly,
11 and actually it is in his letter as well, but with the finals
12 that we are going to get, the finals that we are going to get
13 on September 25th or thereabouts is certified translated --
14 I'm sorry, wrong page -- is finalized transcripts of those
15 recordings or excerpts thereof it intends to introduce at
16 trial.

17 So we are not going to get a final transcript of all
18 of the recordings.

19 THE COURT: Correct.

20 MR. SCHERKER: And the only thing we will have is
21 the draft and we are prohibited from using it because we have
22 to give it back.

23 THE COURT: Yes.

24 MR. SCHERKER: That's what we object to.

25 THE COURT: You can object, but you do not really

Proceedings

38

1 have any rights in this regard. In other words, the
2 Government is providing to you as a courtesy a draft of the
3 exhibit or potential exhibits. If the Government decides not
4 to use that audio as an exhibit, you do not really have a
5 right to their drafts and they are being provided as a
6 courtesy to assist you in your trial preparation.

7 So they can condition the provision of those drafts
8 to help you prepare for trial on the condition that you give
9 it back if they decide they do not want to use the exhibit and
10 once they give you a finalized transcript of anything that
11 they are going to use as an exhibit.

12 MR. SCHERKER: Your Honor, if I might, before I
13 address why I made this request, and it only came up in the
14 response, I actually did some research in a room with Windows,
15 and if I could approach the bench and provide the prosecution.

16 THE COURT: All right. You are going to give a copy
17 to the prosecution as well?

18 MR. SCHERKER: Yes, of course.

19 THE COURT: Okay. When you say with Windows, you
20 mean the computer type or the ones that let you see outside?

21 MR. SCHERKER: Actually both.

22 THE COURT: Okay, I assumed as much.

23 MR. STILLMAN: As long as he returns it when he --

24 THE COURT: Right, exactly.

25 MR. SCHERKER: This is literally the only case I

Proceedings

39

1 could find dealing with drafts. It's written by Judge Rovner
2 of the Second Circuit when she was a district judge, and it
3 involved draft transcripts. And what Judge Rovner says is
4 that, this is on page 3 of the right-hand number page:

5 The Government offered to produce draft transcripts,
6 but only on the condition that the defendants waive any right
7 to use the drafts at trial.

8 Exactly what the Government is doing here. And not
9 to read the whole decision, in the penultimate paragraph the
10 Court says:

11 There may well be disputes as to the accuracy of the
12 final transcripts and the defendant is entitled to review,
13 without conditions, not only the final versions, but any and
14 all prior drafts prepared by the Government as well.

15 Now, for us, the Court is well aware from our
16 severance papers that there is exculpatory evidence for
17 Mr. Napout on those tapes.

18 THE COURT: All right, fine.

19 MR. SCHERKER: That is a draft transcript.

20 THE COURT: No, the exculpatory evidence is on the
21 tape.

22 MR. SCHERKER: It's in a foreign language.

23 THE COURT: Fine. You can get it translated if you
24 want to use it, although you are not going to be allowed to
25 use a tape of Mr. Napout. I don't know if it is Mr. Napout or

1 somebody else saying something that is exculpatory.

2 As I understand it, the Government actually wants to
3 introduce that anyway as a false exculpatory. But regardless
4 of who gets to use it, you are still not entitled to the
5 Government's draft transcript if they decide they are not
6 going to use it. You certainly are entitled to the tapes and
7 to produce your own translation of it. No one is barring you
8 from doing that. But you are asking for the Government to
9 produce for you a transcript that you want to use for whatever
10 purpose at trial or to prepare for trial and to keep in
11 perpetuity. There is no requirement that they do that. And
12 the limited caselaw even that you cited me only stands for the
13 proposition that you are entitled to translations of whatever
14 the Government decides to use at trial.

15 I actually think I would refer you again to Mayes,
16 Judge Ross' decision, where she makes this point quite well
17 about why these draft transcript stipulations are enforceable,
18 which is that the Government gives these recordings to assist
19 defense at trial and that parting with these documents carries
20 a risk to the Government. In their unedited, unfinalized
21 form, draft transcripts will almost inevitably contain typos,
22 ambiguities and preliminary impressions subject to subsequent
23 revision. It is for this reason that the Government only
24 discloses them pursuant to the parties' execution of a
25 stipulation agreement limiting their use. And then it goes on

Proceedings

41

1 to say that the stipulation ensures the accuracy of the
2 transcripts that are ultimately used and prevents the accuracy
3 of the transcripts from becoming the subject of pretrial
4 litigation.

5 So with all due respect to Judge Rovner, I do not
6 agree that defendants have the right to have the Government's
7 draft translations to use however they want to.

8 MR. SCHERKER: Well, Your Honor, if I might then,
9 the procedure the Court is suggesting, and I would like to
10 request modestly that the door be left open if there is some
11 evidence on draft transcripts that we need because I guess
12 what I am hearing from the Government is if we identify
13 favorable evidence on the draft transcript, we have to then go
14 out and get it retranslated and then give the drafts back to
15 the Government.

16 THE COURT: Exactly.

17 MR. SCHERKER: And then we have to fight about the
18 accuracy of that translation with the Government. That seems
19 to be the structure that is being created.

20 THE COURT: That is the upshot. And, in fact, if
21 anything, though, you are getting the benefit of the
22 transcript early on to decide if you think there is something
23 valuable to you in that tape and, therefore, you can get your
24 own translation.

25 MR. SCHERKER: Nothing would bar us from using the

Proceedings

42

1 draft, identifying favorable evidence, and then creating our
2 own transcript of that section of the tape?

3 THE COURT: Absolutely not. That is the purpose of
4 it to some extent, or that is the benefit certainly of it.
5 But you do have to do the work yourself if you are going to
6 decide you want to use it. You cannot use the Government's
7 draft transcripts. They give them to you under that
8 condition, and that has been upheld and I agree that that is
9 appropriate here as well.

10 So if you want the draft transcripts for that very
11 purpose, to decide if they are useful to you, you have to
12 abide by the conditions that the Government gives them to you
13 under.

14 How is that for putting a preposition at the end?

15 Okay, so if you want them, like I said, to some
16 extent the complaint about not getting certain transcripts is
17 self-created. You have to sign that stipulation if you want
18 the 50 updated draft transcripts.

19 Anything else that we need to resolve?

20 Okay, terrific. Nice seeing you all again, and I
21 look forward to hearing from everyone soon enough.
22 September 25th is our next day.

23 Thank you to all of you on the phone. I apologize
24 that the acoustics were less than perfect.

25 MR. NITZE: Thank you, Judge.

Proceedings

43

THE COURT: Okay, thank you.

(Matter adjourned.)

* * * * *

I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

/s/ Stacy A. Mace

August 24, 2017

STACY A. MACE

DATE

SAM

OCR

RMR

CRR

RPR